Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. 87-1311

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MICHAEL ALAN LAU and
BRUCE TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF TO "MEMORANDUM FOR THE UNITED STATES"

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2. STATEMENT OF THE ISSUES

Whether the standard of proof predicate for the admission of similar fact evidence under Rule 404(b), Fed. R. Evid., is "clear and convincing" or some other standard, a question over which the circuits are divided.

3. ARGUMENT AND CITATIONS OF AUTHORITY

In reply to the "Memorandum for the United States," filed on the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, Petitioners wish to bring to the Court's attention several responses to various allegations made by the Government.

The evidence at trial of the Petitioners was circumstantial. It was a very close case. The admission of the similar fact evidence was the critical balance in favor of the prosecution. Most cases involving similar fact evidence are of this narrow range. Where there is overwhelming evidence of guilt, the necessity for similar fact evidence diminishes or becomes unnecessary. It is important therefore that the Supreme Court of the United States establish standards governing the admission of these types of offenses or facts.

In the case below informant Aiello was subjected to some questionable showup procedures. While he testified as having met a "Mike" and a "Bruce," Aiello also had to be subjected to

suggestive courtroom showups in order to confirm his identification. He then testified about a series of facts which easily could have been a fabrication.

A standard of proof will provide a safeguard against fabricated testimony in future prosecution. It is very difficult to prosecute a "successful" criminal episode, i.e. one which achieves its objective. It is very difficult for the prosecution to prove the undetected crime occurred. It is admittedly difficult for the prosecution to prove a successful importation, off-loading, distribution operation unless someone is arrested. But this difficulty does not dissipate the need for corroboration to establish that a crime in fact occurred. It should be independently proven that the "similar fact" occurred and is not the figment of the vivid imagination of an informant seeking to gain favors from the arresting or prosecuting authorities.

There was no corroboration of Aiello below. No level of proof was satisfied that the Broxton,

Georgia, incident occurred in the first instance. The Government never corroborated the flight record that Aiello flew from Miami to Atlanta to have a meeting as he testified. The Government offered no confirming proof of any check that Mr. Aiello allegedly gave Petitioner LAU. The Government offered no telephone records to verify that Mr. Aiello ever called either of the Petitioners as he testified. The Government offered no photographs, maps or plats to prove that an airstrip actually existed in the area Mr. Aiello identified. The Government offered no independent proof that the airplane of the description given by Mr. Aiello ever existed, and no proof of a plane crash in the area Aiello described. The Government volunteers that Aiello's testimony "was in part corroborated by the testimony of a federal agent" (TR469-470, 483), but an examination of the cited record does not substantiate the testimony of Aiello. (The agent merely testified to the organization of the photo array, which does not support Aiello.)

The very fact there was no corroboration of any of the events surrounding Aiello's prior incident testimony, is the reason that a standard of proof is required. Nowhere is a safeguard more important than with the uncorroborated testimony of an alleged co-conspirator who has much to gain by pleasing the authorities with his testimony and little to lose by antagonizing the constitutional rights of his former associates. The integrity of the criminal justice system must be protected. A standard of proof needs to be established in order to give at least initial authenticity to the proffered evidence.

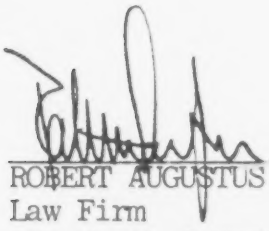
It has been presented that the appropriate standard of proof be "clear and convincing" evidence. Rather than this case being disposed in light of Huddleston, 87-6, as the Government invites, Petitioners wish to join issue on the merits and present argument that the pervasive ramifications of a standard will protect the innocent, correct injustices, and avoid

miscarriage without any attendant sacrifice of viable prosecutions. A procedural safeguard is necessary just as the "two witness" perjury rule, Hammar v. United States, 27 U.S. 620, 46 S.Ct. 603, 70 L.Ed 1118 (1926), is necessary. A check and balance is appropriate under Rule 404(b), Fed. R. Evid., just as "corroborating circumstances" replace one of the two required witnesses in a perjury prosecution. Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495 (1945).

4. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to Charles Fried, Esq., Solicitor General, Department of Justice, Washington, D.C. 20530, by U. S. Mail this 22nd day of April, 1988.

Respectfully submitted,



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